IN THE

Supreme Court of the United States

James J. Hayes

Petitioner,

DESERT ORCHID PARTNERS, L.L.C., individually and on behalf of all others similarly situated and GENESEE COUNTY EMPLOYEES' RETIREMENT SYSTEM, and

NANCY ROSEN, on behalf of herself and all others similarly situated

Respondents,

v.

TRANSACTIONS SYSTEMS ARCHITECTS, INC., WILLIAM E. FISHER, DWIGHT G. HANSON, GREGORY J. DUMAN, DAVID C. RUSSELL and EDWARD FUXA

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

James J. Hayes
Petitioner
4024 Estabrook Dr.
Annandale, Virginia 22003
(703) 941-4694

QUESTIONS PRESENTED

a) Do district court fairness determinations in securities class action settlements pursuant to Rule 23(e) of the Federal Rules of Civil Procedure require economic analyses that show the value of the settlement exceeds the net expected value of continued litigation?

b) Whether institutional bias to favor settlements is a hidden factor in circuit and district court approval of securities class action settlements?

c) Do absent class members filing timely objections to a proposed securities class action settlement pursuant to Rule 23 need to raise in the district court each issue that might be raised on appeal in order to have these issues considered by the circuit court?

d) Whether a circuit court can affirm a district court order that has been timely appealed and briefed without a full opinion that addresses each issue raised in the appeal?

e) Does the adequacy of representation requirements of Rule 23(a) require class counsel to negotiate securities class action settlements on per share terms?

f) Do district courts have a duty to see that the class originally certified continues to be certifiable under Rule 23(a), and to divide the class into subclasses with adequate representation for each when new information shows a conflicting interest among subclasses?

PARTIES TO PROCEEDINGS

The petitioner, James J. Hayes, is a member of the class.

The respondents are the plaintiffs: Desert Orchid Partners, L.L.C., Nancy Rosen, and Genesee County Employees' Retirement System, and the defendants: Transactions Systems Architects, Inc., William E. Fischer, Dwight G. Hanson, Gregory J. Duman, David C. Russell, and Edward Fuxa.

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PETITION FOR WRIT OF CERTIORARI

James J. Hayes, a class member in the above captioned class action, respectfully requests the Court grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the circuit court ("O") affirming the district court's order approving the settlement, and the court's award of attorney's fees is reproduced in the Appendix at A1. The district court's Memorandum Opinion and Order is reproduced at A4.

JURISDICTION

The circuit court entered an judgment on August 13, 2008 and denied the petition for en banc rehearing on September 22, 2008, as shown in the Appendix at A15 and A13. An application for an extension of time within which to file a petition for a writ of certiorari was granted by Justice Alito, who on December 9, 2008 extended the time to and including January 20, 2008. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULES INVOLVED

Constitution, Article III Section 2 in pertinent parts provides:

[t]he Judicial Power shall extend to all Cases in Law and Equity, arising under this

Constitution, the Laws of the United States and...

Fed. R. Civ. P. 23(e) provides:

[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs.

Eighth Circuit Rule 47(b) provides:

[a] judgment or order appealed may be affirmed or enforced without opinion if the court determines an opinion would have no precedential value and any of the following circumstances disposes of the matter submitted to the court for decision:

(1) a judgment of the district court is based on findings of fact that are not clearly erroneous;

(2) the evidence in support of a jury verdict is not insufficient;

(3) the order of an administrative agency is supported by substantial evidence on the record as a whole; or

(4) no error of law appears.

STATEMENT OF THE CASE

This case is an appeal of the district court's approval of a settlement in a securities class fraud brought under the Securities Exchange Act of 1934. In the underlying case, the plaintiffs allege that Transaction Systems Architects ("TSA") and certain of its former officers and directors had, over a three year period beginning in 1999, violated generally accepted accounting principles ("GAAP") and

overstated TSA's earnings and other financial results in press releases, and quarterly and annual financial statements filed with the Securities and Exchange Commission ("SEC"). The plaintiffs allege that TSA schemed to overstate earnings that caused investors to bid up the trading price of TSA stock, which then declined substantially as investors became increasingly skeptical of TSA's financial reporting.

On August 14, 2002, TSA announced that it would reaudit its financial statements for 1999, 2000, and 2001, and that the Chairman of the Board had resigned. TSA's share price fell by nearly 20 percent. On November 19, 2002, TSA announced it would reduce its previously reported earnings by an average of $1.50 per share annually over the three years, after revenues were reduced by more than $145 million. TSA's share price again fell precipitously. TSA develops and markets software products that enable banks and other businesses to process electronic payments.

The defendants deny making materially false and misleading statements based on the contention that TSA's restatements resulted from differences in the auditor's application of judgment with respect to interpretation of complex accounting rules. The defendants assert that factors other than the overstatement of earnings, such as general market and industry conditions, caused the decline in the trading prices of TSA stock. The defendants also contend that the Lead Plaintiff and a majority of the class could not establish the required element of loss causation based on the Court's criteria provided in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005).

On November 14, 2006, the district court

preliminarily approved a proposed settlement negotiated by the Lead Plaintiff's counsel that required the TSA defendants to pay $24.5 million to the class in exchange for the release of the class's claims and the dismissal of the lawsuit. Pursuant to the notice of the settlement, the petitioner filed a timely four page single-spaced objection on February 5, 2007. ("Obj") The objection alerted the district court that circuit courts require that settlement approval be based on "sound economic analysis,... which include[s] a determination of '1) the likelihood of success at trial, and 2) the range of possible recovery.'" (Obj. A17-18: quoting Bennett v. Behring Corp. 737 F. 2d 982-986 (11th Cir. 1984)) The objection then quoted Seventh and Third Circuit opinions that:

> "in cases primarily seeking monetary relief, the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement." (Quoting MCL 2d at 30.44 p. 252)
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> Obj. A19. (Quoting: *Reynolds v. Beneficial Nat. Bank*, 288 F. 3d 277, 284-85 (7th Cir. 2002)) (Quoting: *In Re General Motors Corp. Pick-Up Truck Fuel Tank*, 55 F 3d 768, 806 (3rd Cir. 1995))

On February 26, 2007, the petitioner filed a reply to the Lead Plaintiff's memorandum in support of final settlement approval that was filed on February 15, 2007. The "Reply" alerted the district court that the TSA settlement could not be accorded a "presumption of fairness" because the settlement was negotiated on behalf of the Lead Plaintiff with significant conflict of interest with about 44 percent

of the class. Reply A25-26. The Reply concluded that the district court could not:

> approve a settlement where the representative plaintiff's claims are not typical of the claims of the class or where the representative parties have not fairly and adequately protected the interests of the class as provided by Rule 23(a) and (b) of the Federal Rules. The Eighth Circuit has determined that: "[a] district court has a duty to assure that a class once certified continues to be certifiable under Fed. R. Civ. P. 23(a)."
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> *Id.* A30. (Quoting: *Petrovic v. Amoco Oil* Co., 200 F. 3d. 1140, 1145 (8th Cir. 1998))

On March 2, 2007, the district court issued a Memorandum and Order ("D. Ct. O.") approving the settlement and overruling the petitioner's objection. In finding the settlement as fair adequate and reasonable, the district court did not base its opinion on a sound economic analysis as explicitly required by the Third and Seventh Circuits, or acknowledge that because of the Court's opinion in *Dura* that the Lead Plaintiff no longer met the typicality and adequacy of representation requirements of Rule 23.

The petitioner appealed, and sought to raise the following issues in the circuit court:

> A. Does the district court have a fiduciary duty under Rule 23(e) to see that the class originally certified continues to be certifiable under Fed. R. Civ. P. 23(a), and to divide the class into subclasses with adequate representation for each under 23(c), when new information shows stark conflicts of interest among class members?

B. Does the district court breach its fiduciary duty to individual class members by approving a settlement with an allocation plan that does not reduce the allocation to In-And-Out Members by the probability these members could be dismissed from the case had the litigation proceeded?

C. Does the district court breach its fiduciary duty to the class by approving a settlement without conducting an economic evaluation of plaintiffs' case that includes estimates of the amount of damages the class could recover in a successful trial, and the probability for each possible outcome?

D. Does the district court breach its fiduciary duty to the class by awarding attorney fees to class counsel who acts on a conflict of interest and unfairly allocates the settlement fund to the Plaintiffs' subclass?

On August 13, 2008, the circuit court affirmed the district court's order approving the settlement without considering the issues the petitioner sought to raise on appeal. The district court had subject matter jurisdiction under 15 U.S.C. 78aa, and 28 U.S.C. 1331.

REASONS FOR GRANTING PETITION

This case presents a unique opportunity for the Court to benefit the Nation by improving the practice of class action securities litigation, which has long been corrupted by class action lawyers advancing their own interests at the expense of the class. The questions in this case and most, if not all, securities class action settlements arise from the legal process of getting the settlement approved by the district

court as required by Rule 23 of the Federal Rules of Civil Procedure. District courts approve settlements determined as "fair, adequate and reasonable" to the class following a hearing where class counsel argues for approval of the settlement and for an award of attorney fees. (D. Ct. O. A6)

I. Improving Consideration of Settlement Fairness By Adopting the Economic Analysis Required By the Third and Seventh Circuits

In approving the $24.5 million settlement, the district court determined the "most important consideration in deciding... fair[ness]... is 'the strength of the case for the plaintiffs on the merits, balanced against the amount offered in settlement.'" *Id.* (Quoting *Petrovic* at 1150) The district court's "find[ings] that the outcome of the litigation was far from certain [and] the amount of the settlement in relation to the potential recovery is in line with other securities class action settlements," however, does not support the conclusion that "the proposed settlement is fair," or follow the methodology adopted by the Eighth Circuit in *Petrovic* to evaluate the strength of the case. *Id.*

The Seventh Circuit also considers "'the strength of the plaintiff's case on the merits balanced against the amount offered in the settlement" as the "'most important factor relevant to the fairness....'" *Synfuel Technologies, Inc. v. DHL Express (USA), Inc.*, 66 Fed. Rules Serv. 3d. 229, 234 (7th Cir. 2006) (Quoting: *In re General Motors Corp. Engine Interchange Litig.*, 594 F. 2d 1106, 1132 (7th Cir. 1979)) (Citing the Manual for Complex Litigation ("MCL") 1.46 at 56 (4th ed. 1977)). However in evaluating this factor, the Third and Seventh Circuits require an economic analysis focused on determining the benefits to

the class of the settlement compared to the expected benefits of continued litigation. In the Third Circuit, Judge Edward Becker agreed that:

> "in cases primarily seeking monetary relief, the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement." (Quoting: MCL 2d, 30.44 at 252)
>
> *In Re General Motors Corp. Pick-up Truck Fuel Tank*, at 806.

In the Seventh Circuit, Judge Richard Posner adopted the Third Circuit's economic analysis finding that:

> the judge should have made a greater effort (he made none) to quantify the net expected value of continued litigation to the class, since a settlement for less than that value would not be adequate. Determining that value would require estimating the range of possible outcomes and ascribing a probability to each point on the range....
>
> *Reynolds* at 284-85.

The situation identified by Judge Posner highlights the problem in determining fairness solely on a qualitative consideration of risk. In considering "the strength of the case," the district court only considered that the "outcome of the litigation was far from certain," (A7) but made no effort to "estimat[e] the range of possible outcomes and ascrib[e] a probability to each point on the range...." (*Reynolds* 284-85) Without this economic analysis it is impossible to assess whether the value of the settlement is close

enough to the expected value of continuing the litigation for anyone to determine the proposed settlement is fair.

The Eighth Circuit endorsed these principles in *Petrovic* where the court was considering the district court approval of a settlement for a class of property owners damaged by the underground migration of leaking petroleum. The district court approved a settlement that provided the group most heavily impacted "compensatory damages [of] 54 percent of the property value, net of attorney fees and costs." *Petrovic* at 1150. The objectors argued that this settlement was not fair because two cases went to trial subsequent to the settlement and the property owners were awarded compensatory damages of 50 percent of the property value and $500,000 in punitive damages to each plaintiff. The Eighth Circuit upheld the settlement concluding that:

> although the [litigated cases] ultimately received an amount of punitive damages that outweighed the shortfall in compensatory damages, we do not believe that the speculative possibility of punitive damages is enough to find that the district court abused its discretion in approving the settlement.
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> *Petrovic* at 1150.

This quantitative analysis of the "strength of the case... balanced against the amount offered in the settlement" is focused on the potential outcome from a trial. *Id.* The district court, having adopted the *Petrovic* strength of the case methology, didn't follow the methodology in approving the TSA settlement. The petitioner's objection also alerted the district court that *Reynolds* requires the judge "'to quantify the net expected value of the litigation.'" (Obj. A19: quoting *Reynolds* at 284.)

Most district courts, like the district court here, resist applying the most fundamental economic analysis in considering the fairness of class action settlements. In 2004, Judge Posner reemphasized that "the district judge's duty in a class action settlement is to estimate the litigation value of the claims of the class and determine whether the settlement is a reasonable approximation of that value." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F. 3d 781, 785 (7th Cir. 2004). Following remand, the district court again did not adequately consider the potential value of the claims and Judge Posner reversed and remanded the case a second time.

> In our prior opinion, "we emphasized the district judge's duty in a class action settlement situation to estimate the litigation value of the claims of the class and determine whether the settlement is a reasonable approximation of that value."
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> . . .
>
> [I]n basic terms, a claim analysis under these circumstances would require consideration of (1) the probability of the information-sharing class having grounds of recovery under *any* applicable law; (2) the probability of such favorable law applying to the entire information sharing class; and (3) the probability of winning on the merits. We cited cases describing this methodology in our prior opinion, and do so again. See *Mirfasihi*, 356 F. 3d at 786. (Cites omitted.)
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> *Mirfasihi v. Fleet Mortg. Corp.*, 450 F. 3d 745, 749-50 (7th Cir. 2006)

A few months later, the Seventh Circuit vacated another district court's approval of a class action

settlement "because the court did not adequately evaluate whether the settlement is fair to class members." *Synfuel Technologies, Inc. v. DHL Express (USA), Inc.*, 66 Fed. Rules Serv. 3d. 229, 236 (7th Cir. 2006). The district court's subjective opinion in *Synfuels* that the settlement was "'generous in light of the fact that the Plaintiff's case is subject to a number of strong defenses,'" is similar to the district court's subjective conclusion in TSA that "the settlement is fair, adequate and reasonable in light of the risks of continued litigation...." (*Id.* 233. and D. Ct. O. A7)

The resistance the Seventh Circuit encountered in *Mirfasihi* and *Synfuels* in having district courts base their fairness conclusions on quantitative assessments of risk rather than subjective considerations is also seen in TSA and most securities class action settlement approvals. Merely "find[ing] that the outcome... was far from certain [and] [a]ccordingly,... the proposed settlement is fair" does not, without quantifying both risk and corresponding outcomes, support a conclusion that the settlement is fair. *Id.*

The analysis prescribed by the Seventh Circuit to evaluate the fairness of a class action settlement quantifies all the risk and reward factors of continued litigation necessary to evaluate the adequacy of a monetary settlement. The Seventh Circuit's economic analysis is a quantum improvement over the qualitative declarations currently used by district courts in approving securities class action settlements. Granting this petition provides the Court the opportunity to resolve the current conflict among the circuits and improve the fairness of securities class litigation by extending nationwide the economic analysis required by the Third and Seventh Circuits.

II. Recognizing that Institutional Bias Is Delaying Reforms Needed To Improve the Practice of Class Action Securities Litigation

Granting the petition provides the Court the opportunity to raise the judiciary's awareness of institutional bias as a significant factor in decisions approving securities class action settlements, and the failure of district courts to act as fiduciaries to the class in evaluating class action settlements. In a bar address, the Chief Judge of the Second Circuit characterized institutional bias as "the judge's inbred preferences for outcomes controlled by... representation of lawyers... vis-à-vis other sources of power and wisdom." The Chief Judge warned that "if [the courts] do not acknowledge and restrain our bias, others will notice, and forces will marshal to rein us in." Hon. Dennis Jacobs, The Secret Life of Judges, Fordham L. Rev., 75, 2855 (2006)

The Court has an opportunity to improve the practice securities class action litigation, long corrupted by conflicted class counsel, by acknowledging the court's duty to check any institutional bias favoring approval of class action settlements, and to act as a "fiduciary of the class" in considering class action settlements. *Reynolds* at 279-80.

Few courts, however, recognize the conflict of interest that exists between class counsel and the class at settlement time. Class counsel, with a contingent fee at risk, always prefers settlement, if the settlement provides substantial attorney fees; the class, however, only favors settlements that recover the expected value of damages from a trial. Rather than putting more resources in taking a case to trial and increasing the amount at risk; class counsel

always prefers settlement, and using its marginal resources to initiate new class action suits. (See *In Re Cendant Corp. Litigation*, 264 F. 3d 201, 255 (3rd Cir. 2001) ([T]here is often a conflict between the economic interests of clients and their lawyers, and this fact creates reason to fear that class counsel will be highly imperfect agents for the class.)

As noted in the petitioner's objection, the Seventh Circuit determined:

> [t]he principal issue presented by these appeals is whether the district judge discharged the judicial duty to protect the members of a class in class action litigation from lawyers for the class who may, in derogation of their professional and fiduciary obligations, place their pecuniary self interest ahead of that of the class. This problem, repeatedly remarked by judges and scholars (supporting cases and authority omitted) requires district judges to exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions.

Obj. A20. (Quoting: *Reynolds* at 279-80)

In six years, only a single reported securities class action settlement opinion cites *Reynolds*.[1] This long silence is surprising considering the ubiquitous

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[1] *In re Rite Aid Corp. Securities Litigation*, 396 F. 3d 294, 307 (3rd Cir. 2005) Although, the district court acknowledges that "the district court acts as a fiduciary serving as a guardian of the rights of absent class members," the court did not scrutinize the proposed settlement, but rather relies on class counsel's analysis, which the *Reynolds* court found was incomplete and inadequate. *Grunin* at 123.

conflict of interest between class counsel and the class at settlement time. The court's silence is illustrative, however, of the institutional bias to blindly approve settlements negotiated by class and defense counsel. In this case, the district court's institutional bias in approving the proposed settlement is shown by the court's mischaracterization of petitioner's objection, and its superficial consideration of "'the strength of the case for the plaintiffs on the merits, balanced against the amount offered in the settlement,'" as previously explained in Part I. (D. Ct. O. A6: quoting *Petrovic* at 1150.)

The first point raised in the objection is that "Federal circuit courts uniformly require district courts evaluating the fairness of class action settlements to base their decisions on sound economic analysis." Class counsel, however, "justifies the adequacy of the Settlement solely on the basis that it provides '"substantial cash benefits to Class Members' and that there is 'uncertainty of being able to prove the allegations in the Complaint.'" (Obj. A 18: quoting the Settlement Notice.) The objection cited Judge Posner's opinion that the analysis should "quantify the net expected value of continued litigation to the class" (*Id.* A19: quoting *Reynolds* at 284.) In overruling the objection, the district court ignores the *Reynolds* analysis and only addresses the issues on the "sufficiency of the notice" and "settlement [] structure[]," which plaintiff and defense counsel mischaracterize the substance of the objection. (D. Ct. O. A5) The district court's blind acceptance of counsels' mischaracterization of the objection and its failure to base settlement approval on the sound economic analysis urged in the objection shows the insidious institutional bias characterized by Judge Jacobs.

Also reflective of district court bias is the court's incorrect statement that: "the interests of "hold through" as opposed to "in and out" investors were represented by Louisiana District Attorneys Retirement System," as LDARS's motion to intervene was denied in July 2006. (D. Ct. O. A9) It's unlikely the court forgot this fact as Lead Plaintiff's memorandum in support of final settlement filed on February 15, 2007 discussed the implications of this denial in arguments supporting settlement approval. Rather the court's incorrect statement serves to cover-up the court's bias against the unrepresented "hold through" members, who were significantly better situated on the loss causation issues than the "in and out" investors represented by the Lead Plaintiff.

The problem with district court bias in approving securities class action settlements extends to the circuit court in this case. In a timely filed appeal, the petitioner included the issue on whether the district court breached its fiduciary duty to the class by approving a settlement without conducting an economic evaluation of plaintiffs' case that includes estimates of the amount of damages the class could recover in a successful trial, and the probability of each possible outcome. The circuit court did not consider this issue, or the three other issues in the appeal, on the basis the issue was not timely raised in the district court. The circuit court conclusion clearly did not consider the petitioner's timely objection which devoted two and one-half pages, including quotes from three court opinions, supporting the necessity that district court approvals of securities class action settlements be based on solid economic analysis comparing the expected outcome of the litigation to the settlement.

Most certainly the stated reason for affirming the district court's approval of the settlement was intended to cover-up the institutional bias underlying the district court decision. The cover-up is detectable simply by reading petitioner's objection which then reveals the "insidious bias" underlying the decision that concerned Judge Jacobs as that bias "is hard to make out, in the vast maze of judicial work and outcomes...." The Secret Life of Judges, Fordham L. Rev., 75, 2855, (2006) Therein lays the opportunity for the Court to improve the practice of securities class action litigation by alerting the judiciary to judicial bias as a factor in approving securities class action settlements and the necessity to guard against this propensity by applying the sound economic analysis outlined by the Third Circuit in *Reynolds*, as explained in Part I.

III. Requiring Circuit Courts To Consider Every Issue Related to the Fairness of the Settlement, the Allocation, or Attorney Fees Raised On Appeal Would Improve the Practice of Securities Class Action Litigation

The circuit court did not consider any of the four issues the petitioner sought to raise in the appeal because the petitioner "did not timely raise (if at all) in the district court the issues he argues on appeal,..." (O. A3) Neither did the circuit court write an opinion addressing the petitioner's arguments that the issues were timely raised in the district court, or fell within several exceptions to the general rule. The lack of legal support for the circuit court's conclusions appears the reason the circuit court did not write an opinion.

According to the district court:

> [u]nder Federal Rule of Civil Procedure 23(e), the district court acts as a fiduciary, serving as a guardian of the rights of absent class members.
>
> (D. Ct. O. A6: citing *Grunin* at 123)

Thus in the Eighth Circuit, issues premised on the district not acting as a fiduciary to the class should be considered by the circuit court. As each of the four issues raised in the appeal was premised on the district court not meeting its fiduciary duty to absent class members; the petitioner's appeal should have been considered by the circuit court. Moreover:

> [i]n determining whether to approve the Settlement and Plan of Allocation, the court must determine "whether the proposed settlement is fair, adequate and reasonable." (Cite omitted.) A district court is required to consider four factors in making that determination: (1) the merits of the plaintiff's case, weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement. *In re Wireless Telephone Federal Cost Recovery Fees Litig.*, 396 F. 3d. 922, 932 (8th Cir. 2005)
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> *Id.* A6.

The Seventh Circuit also requires that the district court's evaluation of the first factor include an economic analysis that "quantif[ies] the net expected value of continued litigation... [by] estimating the range of possible outcomes and ascribing a probability to each point on the range..." *Reynolds* at

284-85. (Please see discussion at pgs. 6 -10, infra.) This economic analysis together with the other factors encompass the gamut of issues that plaintiff's counsel must address in the district court to demonstrate the fairness of the proposed settlement to absent class members. If counsel's settlement advocacy fails to address any of the wide range of issues touching on the fairness of the settlement and an objector subsequently appeals the order approving the settlement, its allocation, or the attorney fees and costs; the circuit court has a duty to either decide the unraised issues or to remand the issues to the district court.

This Court decided a similar case in 1940 when the Commissioner of Internal Revenue appealed a decision by the Board of Tax Appeals that certain income was not taxable under two particular sections of the Revenue Act. On appeal, the Commissioner essentially abandoned the two sections argued before the Appeals Board and asserted to the circuit court that the income was taxable under a third section. The taxpayer argued that liability under the third section "was not open for consideration inasmuch as that section had not been relied on before the Board." *Hormel* v. *Helvering* 312 U.S. 555 (1940) The circuit court disagreed and held the income was taxable under the third section. This Court affirmed the circuit court decision.

The Court's opinion acknowledged that "[o]rdinarily an appellate court does not give consideration to issues not raised below." *Id.* 556. But the Court recognized that this could not be an "inflexible practice" as circuit courts have a statutory duty "to modify, reverse or remand decisions not in accordance with law 'as justice may require.'"

(*Id.* 556, quoting: 26 U.S.C. 1141 (c) (1) (Supp. 1939))

In terms of justice, protecting defrauded investors and the market from exploitation by corrupt lawyers who "place their pecuniary self-interest ahead of the class" is more worthy of the Court's consideration than protecting the IRS Commissioner from his mistake in assessing a tax deficiency against an individual taxpayer. *Reynolds* at 279. The IRS should be responsible for knowing the appropriate section of the Revenue Act to assert a tax deficiency. Because of the IRS mistake, the taxpayer was stuck with the costs in successfully challenging the original basis for the tax deficiency, and the additional costs of two appeals, which likely could have been avoided if IRS had based their assessment on the proper section of the Revenue Act.

The cries for justice are much louder in class actions with large numbers of members who did not participate in the equally complex proceedings of securities fraud litigation. Class members preparing objections must necessarily rely on the disclosures of conflicted class counsel, which, for example, typically omit objective information on damages and outcomes that might suggest an unfair settlement. It's only after the objector sees counsel's arguments for settlement approval, that issues which counsel avoided (in order to obtain approval for the settlement and more importantly counsel's fees) becomes apparent. Justice cannot cry out more loudly for this Court to grant the petition to insure that circuit courts consider every issue an objector could raise related to the fairness of the settlement, its allocation or the appropriate attorney fees regardless of whether the specific issues were raised in the district court.

Moreover, because class counsel is obligated to fully address all fairness issues in advocating for the settlement; counsel should not be able to avoid consideration of issues on appeal that counsel did not address in the district court. To do otherwise would reward class counsel for inadequate representation of the class. All these circumstances resonate more strongly in securities class actions than in *Hormel*, and the Court's conclusion that circuit courts have a statutory duty "to modify, reverse or remand decisions not in accordance with law," regardless of whether the issues were raised in the district court applies more convincingly in securities class action appeals. *Id.* 556.

The Court should not doubt that securities class litigation has been corrupted by class action lawyers. An extraordinary example is the twenty-five year kick-back scheme recently revealed in non-prosecution agreement with the law firm that initiated about half of the nation's securities class action suits. The settlement included an admission that the firm secretly paid lead plaintiffs in more than 165 class actions that earned $240 million in legal fees.[2] Secret payments to representative plaintiffs ensure their approval of any settlement negotiated by class counsel and secure corrupted statements on settlement fairness, which are then used to help persuade the court and the class. Bill Lerach, a notorious participant, termed the kickback

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[2] The Milberg firm paid $75 million to avoid a criminal trial. Both Mr. Lerach and Mr. Weiss pled guilty. Mr. Lerach was required to forfeit $7.75 million and was sentenced to two years in prison; Mr. Weiss was required to pay a penalty of $250,000 and forfeit $9.8 million, and was sentenced to 30 months. Jonathan D. Glater, "Big Penalty Set for Law Firm, but Not a Trial." *N.Y. Times.com*, June 17, 2008.

scheme, an "industry practice." *Id.* n.2.

By granting the petition, the Court could improve the practice of securities class action litigation by ensuring that circuit courts meet their duty in carefully considering the appeals of objecting class members, regardless of whether the issues raised in the appeal were raised in the district court.

IV. Eliminating Eighth Circuit Rule 47(b) and Requiring Full Appellate Opinions Would Benefit the Nation By Improving the Judicial Process

The circuit court, citing Eighth Circuit Rule 47(b), wrote a two sentence explanation affirming the district court's approval of the $24.5 million settlement, $7.0 million in attorney fees and costs, and the allocation plan as requested by class counsel. Rule 47(b) provides "[a] judgment or order appealed may be affirmed or enforced without opinion if the court determines an opinion would have no precedential value" and there is one additional circumstance that disposes the matter submitted to the court. The rule lists four additional circumstances, however the court did not identify the one it relied on to invoke 47(b). The "no error of law appears," circumstance seems the best choice, however.

Granting the petition provides a unique opportunity to consider whether affirming a district court's judgment or order on appeal without an opinion is contrary to a circuit court's judicial duty and deprives citizens of constitutional due process. Regardless of Rule 47(b)'s constitutional and legal merits, the administrative purpose for the Rule – reducing the delay in deciding appeals – could be

better remedied by employing more law clerks.[3] This alternative solution looks even better considering the intangible benefits of more law clerks. Preventing just one *Brown v. Board of Education*, 347 U.S. 483 (1954) from falling through the cracks of Rule 47(b) are too great for the Court not to consider eliminating this rule.

Moreover, the Court has long held that rules of practice and procedure should not determine the outcome of a case.

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy.
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> *Hormel v. Helvering* 312 U.S. 552, 557 (1940)

Notably, the Eight Circuit has written many opinions in appeals where the appellate issues were not raised in the district court including:

- *Morrow v. Greyhound Lines, Inc.*, 541 F. 2d 713, 724 (8th Cir. 1976) The court "conclude[d] that the appellant's failure to properly object to the admissibility of Dr. Kirby's inflation testimony precludes our consideration of that issue...."

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[3] There may be an opportunity for the Court to fund a program to substantially increase in the number of law clerks for all federal courts through the economic stimulus program now being crafted by the Congress. A program that would create new jobs and improve the efficiency of the judiciary should rank such a program very high on the cost/benefit list.

- *Stafford v. Ford Motor Co.*, 790 F. 2d 702, 706-07 (8th Cir. 1986) The court decided the record was inadequate to decide the newly raised issue and remanded the case to the district court.
- *Seniority Research Group v. Chrysler Motor Corp.*, 976 F. 2d 1185, 1188 (8th Cir. 1992) The court concluded: "[t]he record... is sufficient... to decide the 2(b) issue," and held "that the Group has not exhausted the Section 2(b) procedure.
- *Orr v. Wal-Mart Stores, Inc.*, 297 F. 3d 720, 725 (8th Cir. 2002) The court was not persuaded that "either exception applies." The dissenting opinion considered this a "myopic treatment of the record before the district court." *Id.* 726.
- *Gilbert v. Des Moines Area Community College*, 495 F. 3d 906, 915 (8th Cir. 2007): the court did not invoke Rule 47(b) in rejecting a newly raised argument; concluding the court would "'consider a newly raised argument only if it is purely legal and requires no additional factual development.'" (Quoting: *Orr v. Wal-Mart Stores, Inc.* at 725.

The circuit court erred in applying Rule 47(b) in TSA as the panel did not consider whether the appellate issues, which they asserted were not raised in the district court, were exceptions to the general rule. Moreover, the fact that the Eighth Circuit considered exceptions to this rule for more than 30 years, raises questions on the court's bias and whether the court is abusing its power in applying 47(b).

Then there is the general question on whether a local rule permitting a circuit court to affirm a district court judgment or order without the benefit

of an opinion is a breach of judicial duty that goes to the fundamental power of the Court to consider:

> all Cases in Law and Equity, arising under this Constitution, the Laws of the United States and,...
>
> Constitution, Article III Section 2.

The circuit courts' promulgation of local procedural rules must support and not hinder the exercise of the Court's power in considering Cases. Chief Justice, John Marshall, first described the process.

> It is emphatically the province and duty of the judicial department to say what the law is. *Those who apply the rule to particular cases, must of necessity expound and interpret that rule.* If two laws conflict with each other the courts must decide on the operation of each. So if the law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> *Marbury v. Madison*, 5 U.S. (1Cr.) 137, 177 (1803) (*Emphasis added*).

The premise underlying Rule 47(b) that a circuit court can affirm a district court judgment or order without the discipline of an opinion conflicts with the judicial duty described by Marshall as "[t]hose who apply the rule to particular cases, must of necessity

expound and interpret that rule." *Id.* In 2004, the Hon. Michael Chertoff similarly explained the necessity of opinions in deciding cases.

> Judicial opinions are the core work-product of judges. They are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic.
>
> *Bright v. Westmoreland County*, 380 F. 3d 729, 732 (3d Cir. 2004)

Judge Chertoff's exposition on the necessity of judicial opinions was in response to a "procedural impropriety" where a district court indicated that it planned to dismiss Bright's complaint before the due date for the response to the motion to dismiss. Judge Chertoff concluded this impropriety "undermines the legitimacy of the dismissal order," *Id.* 730 as it deprived plaintiff of an "independent review of his claim." *Id.* 731. On remand, Judge Chertoff ordered the district court "to engage in an independent judicial review of Bright's claims and the appellee's motion to dismiss and, should it again decide to dismiss, for it to prepare an opinion explaining the reasons for its order." *Id.*

Granting the petition provides the court the opportunity to reconsider rule 47(b) in light of the Court's Article III duties to expound and interpret the law.

V. Requiring Class Counsel to Negotiate Securities Class Action Settlements On Per Share Terms Would Improve the Practice of Securities Class Action Litigation

As currently practiced, securities class action settlements are negotiated on a class wide basis rather than a per share basis. In this case, class counsel negotiated a settlement of $24.5 million, which (before deduction of attorney fees and expenses) plaintiff's damage expert estimated at $0.83 per TSA share. Requiring class counsel to negotiate securities class action settlements on per share terms, however would improve the practice of securities class action litigation.

First, the ability of lawyers to obtain multi-million dollar fees from settlements that provide investors a few pennies a share is the driving force behind frivolous class actions.[4] Class action lawyers created this situation by negotiating class wide settlements (rather than a per share settlement) and then requesting a percentage of the total settlement for a fee. Class wide settlements create the conflicts of interest between counsel and the class recognized by the Third and Seventh Circuits.

According to the Seventh Circuit:

> [t]he principal issue presented by these appeals is whether the district judge discharged the judicial duty to protect the members of a class in class action litigation

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[4] In many class actions, the cost to class members of documenting and filing a claim exceeds the recovery and consequently most investors do not file claims. One study showed that more than half of institutional investors do not file claims.

> from lawyers for the class who may, in derogation of their professional and fiduciary obligations, place their pecuniary self interest ahead of that of the class.
>
> *Reynolds* at 279.

By recognizing this lawyer created conflict violates the adequacy of representation requirements of Rule 23; the district judge could substantially reduce the conflict by requiring that settlement negotiations be conducted on a per share basis. Attorney fees would then be deducted from the claims filed. Low per share settlements would attract few claims, and the resultant attorney fees would not justify frivolous class actions. Per share settlements combined with the economic analyses required by *Reynolds* would create an identity of interest between class counsel and the class that could result in a quantum improvement in the practice securities class action litigation. Lawyers would restrict filing class actions to cases with significant per share damages provable in a trial. Settlement negotiations would be focused on damages, and not on a settlement fund sufficiently large to pay counsel the desired fee. (Also see Obj. A21-22.)

Second, class wide settlements make it difficult to assess the fairness and adequacy of the settlement, which is necessary for class members in deciding whether to object to the settlement. While the PLSRA requires that settlement and damage disclosures be in per share terms, this requires conversion of the class wide settlement by estimating the number of shares damaged by the alleged fraud. These estimates are possible only by using complex trading models with unknown accuracy. Damage

estimates, which are based on the market reaction to corrective disclosure are more easily and accurately determined on a per share basis. Class counsel, however, whose interest is minimizing objections that are considered by the court in evaluating fairness, uses class wide settlements to obscure settlement fairness and to minimize objections.

Finally, class counsel exploits the unrecognized conflict of interest created by class wide settlement negotiations to argue that "there is a presumption of fairness when a settlement is negotiated at arm's-length by well informed counsel." *Weinberger v. Kendrick*, 698 F. 2d 61, 74 (2d. Cir. 1982) Truly arms-length negotiations, however, only occur when negotiations are on a per share basis, otherwise class counsel is in effect negotiating its fee and the defendants are benefiting from this subterfuge with a lower settlement than would be possible if the settlement were negotiated on a per share basis. Granting the petition and requiring that settlement negotiations be based on per share amounts could improve the practice of securities class litigation.

VI. Improving the Practice of Securities Class Action Litigation Could Increase National Wealth

Granting the petition is also a key to the realization of the national benefits of the 1995 Private Securities Reform Litigation Act (PSLRA). In debating this legislation, Congress observed that securities class action litigation was driven by lawyers that resulted in settlements that provided class members pennies for each dollar of alleged damages, and lucrative multi-million dollar fees for

the class action lawyers representing the class. A pre-reform *Forbes* profile of William Lerach, who recently accepted prison and forfeited $7.75 million for his role in paying off lead plaintiffs, characterized the lawyer's role:

> Though ostensibly an attorney for named plaintiffs, Lerach is not really accountable to them, instead pretty much deciding on his own whom to sue and when to settle and for how much. "I have the greatest practice of law in the world. I have no clients."
>
> *Forbes*, 11 Oct. 1993: 52

Mr. Lerach's Congressional testimony amplified on the *Forbes* explanation.

> I hire the plaintiff. I do not have some client telling me what to do. I decide what to do.
>
> 141 Cong. Rec. 192, S17956-57.

The Court cited the House Report that "manipulation by class action lawyers of clients whom they purportedly represent" had become rampant in recent years. *Merrill Lynch, Pierce, Fenner & Smith Inc., v. DADIT*, 547 U.S. 71, 81 (2006) (Quoting: H.R. Conf. Rep. No. 104-369, p.31 (1995))

The PSLRA seeks to curb abuses by empowering the courts to dismiss suits with little factual or legal merit, and by requiring that settlement notices include per share data on damages, attorney fees, and recoveries. Stated objectively, this information provides both class members and the courts a basis

to evaluate the fairness of proposed settlements.[5] There is little evidence that the PSLRA has had a positive effect on securities class action outcomes. The median settlement recovered a paltry 3.5 percent of estimated damages (before attorney's fees and costs) based on 726 settlements between 1997 and 2005.[6] The median recovery would likely be substantially higher if the PSLRA was effective in reducing low merit class actions and focusing settlement negotiations and approval on damages.

Moreover, in the thirteen years since Congress passed the PSLRA, the Court has sided with corporate defendants by making it more difficult for investors to maintain securities fraud class actions. Corporate defendants sought more restrictive interpretations of PSLRA to reduce both the number of class actions and the litigation value of those that are filed. More restrictive pleading requirements like those promulgated in *Dura* and *Tellabs* are more likely to impair or limit meritorious actions than frivolous ones. TSA is a good example of a meritorious class action driven to a premature settlement because of the uncertainty in pleading loss causation in light of *Dura*. Notably, the *Dura* district court determined on remand, that the amended complaint met the Court's loss causation

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[5] U.S.C. 78U-4(a)(7)(A,B, &C). Class counsel avoids disclosing estimates on damages due to a loophole in the PSLRA, which provides that damage estimates need not be disclosed if there is disagreement between plaintiffs and defendants on damages. However, the centrality of damages in the assessment of settlement fairness dictates disclosure of plaintiffs' estimates. (See *In Re General Motors Corp Pick-up Truck Fuel Tank* at 7, infra.)

[6] L. E. Simmons & E. M. Ryan, *Post-Reform Act Securities Settlements: 2005 Review and Analysis*, at 5. (Cornerstone Research 2006)

requirements.[7] *In Re Dura Pharmaceuticals, Inc. Securities Lit.*, 452 Fed. Supp. 1005, 1023 (S.D. Cal. 2006)

While reducing the costs of frivolous litigation benefits investors by increasing overall market values, restrictive interpretations could have unintended consequences of disabling meritorious class actions. This reduces investor confidence causing market losses greater than the market gains produced by the reduction in frivolous litigation. Perspective on the national benefits from improving the practice of class action securities litigation is gained by considering the following hypothetical example. Let's assume a seven trillion dollar market capitalized at a conservative EBITDA (earnings before interest, taxes, depreciation and amortization) multiple of five and securities class action settlements at $3.0 billion annually; $0.5 billion attributed to frivolous actions, and $2.5 billion from meritorious actions, which settle for ten cents on the dollar of damages.[8] The benefits of eliminating the frivolous class actions are easily calculated at $2.0 billion by capitalizing the $0.5 billion attributed to frivolous actions at the EBITDA multiple of five reduced by the settlement.

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[7] Similarly, in *Tellabs* the Seventh Circuit reaffirmed the "decision to reverse the judgment of the district court dismissing the suit." *Makor Issues & Rights, LTD v. Tellabs Inc.*, 513 F. 3d 702, 712 (7th Cir. 2008)

[8] Actual annual settlements in billions of dollars by year beginning in 2001: 2.2, 2.9, 2.6, 3.4, 3.5, 10.4, and 3.8 in 2007, excluding Enron, Tyco, and WorldCom. (These would increase settlements by 6.2, 7.2, and 3.2 billion in the years 2005 thru 2007 respectively.) *Securities Class Action Settlements, 2007 Review and Analysis*, p.1, http://securities. cornerstone.com

The national benefits obtained from investors fully recovering their fraud losses in class action litigation are more complex. First we need to recognize that the historic failure of class action litigation to fully compensate millions of investors for hundreds of billions in fraud losses in Enron, Tyco, and WorldCom, for example, has reduced investor confidence in the market.[9] Let's assume the loss in confidence reduced the EBITDA multiple investors pay for earnings to 4.5 from 5.0. In a $7 trillion market, regaining that confidence would lead to a 0.5 positive change in the EBITDA multiple that would lead to a $350 billion increase in national wealth. Achieving this benefit, however, comes at the cost of paying out the settlements, which we've assumed at $25 billion. Capitalized at a 4.0 EBITDA multiple, which counts the $25 billion returned to investors as a benefit; the net reduction in market value due to the settlements would be $100 billion. Thus the increase in national wealth in this hypothetical example is $250 billion.

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[9] On 8/24/01 with the stock in the thirties, the Enron CEO told investors that there are no accounting issues, no trading issues, no reserve issues, no previously unknown problem issues and the company is probably in the strongest and best shape that is has ever been in. On 11/29/01, however, Standard and Poor's, Moody's and Fitch cut Enron's debt rating to junk status, and the stock traded below one dollar per share.

Investors deciding whether to invest and the price to pay for a particular stock do so with knowledge that investors in stocks such as Enron, Tyco, World Com and many other companies relying on the truthfulness of these companies statements and accounting lost all or a significant part of their investment, which was not recovered in the following litigation. This knowledge causes investors, who must rely on the truthfulness of similar statements and accounting, to lose confidence and either not invest or heavily discount all company statements and accounting; either event results in lower stock prices.

Combining the benefits, $2.0 billion from reducing meritless class actions, and $250 billion for providing class members full recovery of their fraud losses in the meritorious actions would increase national wealth by $252 billion. While the Court might gain a better understanding by trying different assumptions, it's difficult not to conclude that improving investor confidence through full recovery of investors' fraud losses offers substantially more benefits than reducing low merit litigation. This would be particularly true today when the current financial crisis, which undoubtedly includes a substantial amount of securities fraud, has reduced investor confidence to levels not seen in seventy five years.

The Court could be instrumental in improving investor confidence and increasing national wealth by alerting the courts below to check longstanding bias favoring approval of class action settlements, and the fiduciary duty of the court to insure that the settlement is greater than the potential recovery from a trial, reduced by the probability of non-recovery.

CONCLUSION

Granting the petition provides the Court a unique opportunity to increase national wealth by improving the practice of securities class action litigation.

January 19, 2009

Respectfully Submitted,

James J. Hayes
Petitioner, *Pro Se*

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 07-1720

Genesee County Employees' Retirement System; Desert Orchid Partners, L.L.C., individually and on behalf of all others similarly situated, Appellees, v. Dwight C. Hanson; Transaction Systems Architects, Inc.; William E. Fischer; Gregory J. Duman; Edward Fuxa; David C. Russell, Appellees, v. James H. Sykora; Thomas G. Foley, Interested parties, James J. Hayes, Appellant, Alan Young; Karen Young, Interested parties,	: Appeal from the United States District Court for the District of Nebraska. : [UNPUBLISHED]

Nancy Rosen, On Behalf of Herself and All Others Similarly Situated; Genesee County Employees' Retirement System,

Appellees,

v.

Transaction Systems Architects, Inc.; Dwight G. Hanson,

Appellees,

Greg Duman,

Defendant,

William E. Fischer; Edward Fuxa,

Appellees,

Harlan F. Seymour,

Defendant,

James J. Hayes,

Appellant,

David Russel,

Appellee.

Submitted: August 7, 2008
Filed: August 13, 2008

Before MURPHY, BYE, and BENTON, Circuit Judges.

PER CURIAM.

In this securities class action lawsuit, class member James Hayes appeals the district court's[1] order approving a settlement and its judgment of dismissal. Because Hayes did not timely raise (if at all) in the district court the issues he argues on appeal, we do not consider them. Accordingly, we affirm. See 8th Cir. R. 47B.

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[1]The Honorable Joseph F. Bataillon, Chief Judge, United States District Court tbr the District of Nebraska.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DESERT ORCHID PARTNERS, L.L.C., individually and on behalf of all otherssimilarly situated, Plaintiff, v. TRANSACTION SYSTEMS ARCHITECTS. INC., WILLIAM E. FISCHER, GREGORY J. DUMAN, DWIGHT G. HANSON, DAVID C. RUSSELL, and EDWARD FUXA Defendants.	)	8:02CV553 MEMORANDUM AND ORDER
NANCY ROSEN, individually and on behalf of all others similarly situated, Plaintiff, v. TRANSACTION SYSTEMS ARCHITECTS, INC., WILLIAM E. FISCHER, GREGORY J. DUMAN DWIGHT G. HANSON, DAVID C. RUSSELL, and EDWARD FUXA, Defendants.	)	8:02CV561 MEMORANDUM AND ORDER

March 2, 2007

This matter is before the court on the plaintiffs' motions for settlement approval, Filing Nos. 358 in 8:02CV553 and 395 in 8:02CV561, plaintiffs' motions for attorneys' fees, Filing No. 362 in 8:02CV553 and 397 in 8:02CV561, and on the following class

members objecftions to the Stipulation of Settlement: James Sykora, Filing No. 354 in 8:02CV553; Thomas G. Foley, Filing No. 355 in 8:02CV553; James J. Hayes, Filing No. 356 in 8:02CV553; and Alan and Karen Young, Filing No.369 in 8:02CV553. In addition, plaintiffs made an oral motion for court approval of the supplemental notice of class action settlement.

I. OBJECTION

By previous order, this court preliminarily approved the parties' Stipulation of Settlement ("settlement"), Filing Nos. 350 in 8:02CV553 and 392 in 8:02CV561, subject to notice and a hearing. Filing No. 351. A fairness hearing was held on February 23. 2007. The objecting class members did not appear at the hearing. The court has been advised that the objections of Alan and Karen Young have been rendered moot by an amendment to the Plan of Allocation to the Net Settlement Fund ("Plan of Allocation") that will strike certain language from the Plan. By his own admission, James Sykora is not a member of the class. He asserts he "bought 400 shares of TSA February 14, 2005." The class period ended on November 19. 2002. See Filing No. 138, Report and Recommendation on Class Certification at 12.

James Hayes challenges the sufficiency of the notice of proposed settlement and contends that the notice should include estimates of the potential damages recoverable after trial. Neither Fed. R. Civ. P. 23(e) nor the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(a)(4)(B)(i)-(ii), require such specificity of notice. Hayes also proposes that the settlement should be structured so that each class member recovers a specific amount regardless

of the aggregate number of proofs of claim submitted, Thomas G. Foley objects to the size of the requested fee award as egregious and unjust. The court finds these vague and general objections are expressions of opinion that are not supported by law. The court has considered the objections to the settlement and finds them lacking in merit. Accordingly, the court finds the objections should be overruled.

II. SETTLEMENT APPROVAL

Under Federal Rule of Civil Procedure 23(e), the district court acts as a fiduciary, serving as a guardian of the rights of absent class members. *Grunin v. Int'l House* of *Pancakes,* 513 F.2d 114, 123 (8th Cir.1975). In determining whether to approve the Settlement and Plan of Allocation, the court must determine "whether the proposed settlement is fair, adequate and reasonable." *In re Wireless Telephone Federal Cost Recovety Fees Litig.,* 396 F.3d 922, 932 (8th Cir.), *cert. denied sub nom. Stainless Systems Inc. v. Nextel West Corp.,* 126 S. Ct. 356 (2005). A district court is required to consider four factors in making that determination: (1) the merits of the plaintiff's case, weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement. *Id.* at 932. The most important consideration in deciding whether a settlement is fair, reasonable, and adequate is "the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." *Petrovic v. Amoco Oil Co.,* 200 F.3d 1140, 1150 (8th Cir.1999) (internal quotations omitted).

In this action, plaintiffs alleged that defendants

prematurely recognized revenue in connection with certain software licensing arrangements between Transaction Systems Architects and its customers in violation of generally accepted accounting principles ("GAAP"), and made materially false and misleading statements concerning TSA's revenue and other financial results in press releases and in reports filed with the Securities and Exchange Commission. The Class, with certain defined exclusions, comprises persons and entities that purchased or acquired TSA common stock between January 22, 1999, and November 19, 2002. The Settlement provides for the payment by defendants of twenty-four million, five hundred thousand dollars ($24,500,000.00) in cash.

At the time that the settlement was negotiated, there remained significant factual and legal issues with respect to causation and the nature and amount of plaintiffs recoverable damages. Proof of both liability and damages in securities cases is complex and difficult and generally requires a significant amount of expert accounting or statistical evidence. Based on its familiarity with the case, the court finds that the outcome of the litigation was far from certain. Accordingly, the court finds the proposed settlement is fair, adequate and reasonable in light of the risks of continued litigation and the the difficulty of proving the required elements of scienter and loss causation subsequent to the United States Supreme Court decision in *Dura Pharma., Inc. v. Broudo,* 544 U.S. 336 (2005).

Further, the record reveals no evidence of collusion between the plaintiffs and defendants. The parties were represented by counsel with experience in class action and securities litigation. All parties vigorously pursued their respective positions

throughout the course of the itigation. The parties made several attempts at mediation. See Filing No. 360, Ex. 1, Affidavit of David J. Goldsmith ("Goldsmith Approval Aff.") at 11-13. The record shows that the stipulation of settlement was negotiated at arms length with the assistance of qualified mediators. *Id.* at 13. The amount of the settlement in relation to the potential recovery is in line with other securities class action settlements. See, e.g., *Wal-Mart Stores, Inc. v. Visa USA., Inc.,* 396 F3d 96, 119 (2d Cir. 2005) (acknowledging a "range of reasonableness with respect to a settlement"); *In re Cendant Corp. Litig.,* 264 F3d 201, 242 n.22 (3d Cir. 2001) (observing that approved settlements tend to range from 1.6% to 14% of claimed damages); *In re Mego Fin. Corp.* Sec. *Litig.,* 213 F.3d 454, 458-59 (9th Cir. 2000) (affirming award amounting to one-sixth of the potential recovery).

The defendant's financial condition also weighs in favor of approval of the settlement. The record shows that the settlement was mediated with the participation of counsel for defendants' several insurance carriers. *See* Goldsmith Approval Aff. at 12. Plaintiffs assert that defendant's directors and officers liability insurance coverage will be exhausted by the settlement and Transaction Systems Analysts will have to fund the remainder. See Filing No. 359, Plaintiffs' Brief in Support of Motion for Approval of Settlement at 19. A judgment in the range of that originally sought by the class would have risked defendants' insolvency. See *Id.* Moreover, the anticipated complexity, cost and duration of continued litigation would have been considerable and would have consumed substantial judicial and other resources.

The class members have been properly notified in conformity with the PSLRA, 15 U.S.C. § 78u-4(a)(4)(B)(i)-(ii), and only a handful of objections to the proposed settlement have been filed. Briefly stated, the objections challenge only the method and timing of allocations of damages and the propriety of an attorney fee award. The objections do not raise a substantive challenge to the fact or amount of settlement. The interests of "hold through" as opposed to "in and out" investors were represented by Louisiana District Attorneys Retirement System ("LDARS"), who has not objected to the settlement.

The Allocation Plan is modeled on plaintiffs' contention that the amount of artificial inflation in the price of TSA shares attributable to defendants' alleged wrongdoing, expressed as a percentage of the stock's closing price, varied among sixteen separate subperiods within the class period. The Allocation Plan was developed in consultation with plaintiffs' damages expert and is consistent with the plaintiffs' damages theory and the Supreme Court's decision in *Dura Pharma,* Inc., 544 U.S. at 347. The Plan provides a pro rata distribution of the Net Settlement Fund among all class members based on the timing of their purchase and sale of shares, taking into account the relative amounts of allegedly artificial price inflation at various times during the class period. The court finds such an allocation is equitable and reasonable. As noted, the single objection to the Plan of Allocation has been rendered moot.

III. ATTORNEYS' FEES

In their motion for fees, plaintiffs seek an award of attorneys' fees in the amount of $5,512,500.00, or twenty-two-and-one-half percent (22.5%) of the

Settlement Fund, including interest on the fees at the same rate and for the same period as earned by the Settlement Fund, and reimbursement of expenses in the amount of $1,505,705.51. Plaintiffs also seek a compensatory award to Genesee, in connection with time spent discharging its duties as Lead Plaintiff and class representative, in the amount of $2,218.88.

Class members were properly notified that plaintiffs would apply to the court for an award of attorneys' fees in an amount not to exceed 22.5% of the Settlement Fund, plus reimbursement of expenses totaling approximately $1,750,000.00. The Settlement Notice also advised class members of their right to object or otherwise be heard by this court with respect to the petition for attorneys' fees and expenses. See Filing No, 365 in 8:02CV553, Index of Evid., Ex. I, Affidavit of David J. Goldsmith ("Goldsmith Fee Aff."), attached Ex. B. As noted, few objections to the amount of fees were filed. Those objections asserted vague and general dissatisfaction with fee awards in securities and class action cases.

The record shows that plaintiffs' counsel spent over 1,700 hours prosecuting this action, resulting in a combined lodestar amount of over seven million dollars. See Filing Nos. 365 & 366 in 8:02CV553, Goldsmith Fee Aff., attached Exs. A-E. The court finds this expenditure of time was justified by the unquestionable complexity and difficulty of the case. The record documents extensive investigation and discovery by plaintiffs' counsel, as well as active motion practice. See Goldsmith Approval Aff. at 7-11.

It is well established in this circuit that a district court may use the "percentage of the fund"

methodology to evaluate attorney fees in a common-fund settlement. *Petrovic v. Amoco Oil* Ca, 200 F.3d 1140, 1157 (8th Cir. 1999) (affirming a fee of 24% of monetary benefits in class action suit); see *also In re U.S. Bancorp Litigation,* 291 F.3d 1035, 1037 (8th Cir. 2002) (finding no abuse of discretion in 36% fee award). Class counsel has obtained a significant monetary benefit on behalf of the class. See, e.g., *Petrovic,* 200 F.3d at 1156. The "lodestar" approach is sometimes warranted to double-check the result of the "percentage of the fund" method. *Id.*

As compared to the lodestar, a fee award of 22.5% does not appear overly generous. The award is in line with fee awards in other class action and securities cases. The court accordingly finds that the requested fee is reasonable. In addition, plaintiffs have shown that they incurred in unreimbursed expenses in the amount of $1,505,705.51. The court will grant plaintiffs' motions for an award of costs and expenses in that amount. Further, the court approves supplemental notice of class action settlement in substantially the form set forth in Filing No. 361, Index of Evid., Goldsmith Approval Aft., attached Ex. H. Accordingly,

IT IS ORDERED:

1. James Sykora's objection to the Stipulation of Settlement (Filing No. 354 in 8:02CV553) is overruled. Thomas G. Foley's objection to the Stipulation of Settlement (Filing No. 355 in 8:02CV553) is overruled. James J. Hayes's objection to the Stipulation of Settlement (Filing No. 356 in 8:02CV553) is overruled. Alan and Karen Young's objection to the Stipulation of Settlement (Firing No. 369 in 8:02CV553) is overruled as moot.

2. Plaintiffs' motions for settlement approval (Filing Nos. 358 in 8:02CV553 and 395 in 8:02CV561) are granted.

3. Plaintiffs' motions for attorneys' fees (Filing Nos. 362 in 8:02CV553 and 397 in 8:02CV561) are granted.

4. Plaintiffs' proposed supplemental notice of class action settlement is approved.

5. A judgment and order of dismissal will be entered in conformity with this Memorandum and Order.

DATED this 2nd day of March, 2007.

BY THE COURT:

s/Joseph F. Bataillon
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-1720

Genesee County Employees' Retirement System and Desert Orchid Partners, L.L.C., individually and on behalf of all others similarly situated.

Appellees,

v.

Dwight G. Hanson, et al,,

Appellees,

v.

James H. Sykora and Thomas C. Foley,

James J. Hayes,

Appellant,

Alan Young and Karen Young,

Nancy Rosen, On Behalf of Herself and All Others Similarly Situated and Genesee County Employees Retirement System,

Appellees,

v.

Transaction Systems Architects, Inc. and Dwight G. Hanson,

Appellees,

Greg Duman,

William E. Fischer and Edward Fuxa,

Appellees,

Harlan F. Seymour,

Defendant,

James J. Hayes,

Appellant,

David Russell,

Appellee.

Appeal from District of Nebraska - Omaha
(8:02-cv-00553-JFB)
(8:02-cv-00561-JFB)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Riley did not participate in the consideration or decision of this matter.

September 22, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit,

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-1720

Genesee County Employees' Retirement System; Desert Orchid Partners, L.L.C., individually and on behalf of all others similarly situated,

Plaintiffs - Appellees,

v.

Dwight C. Hanson; Transaction Systems Architects, Inc.; William E. Fischer: Gregory J. Duman; Edward Fuxa; David C. Russell,

Defendants - Appellees,

v.

James H. Sykora; Thomas C. Foley,

Interested parties,

James J. Hayes,

Interested party - Appellant,

Alan Young; Karen Young,

Interested parties,

Nancy Rosen, On Behalf of Herself and All Others Similarly Situated; Genesee County Employees Retirement System,

Plaintiffs - Appellees,

v.

Transaction Systems Architects, Inc.; Dwight G. Hanson,

Defendants - Appellees,

Greg Duman,

Defendant,

William E. Fischer: Edward Fuxa,

Defendants - Appellees,

Harlan F. Seymour,

Defendant,

James J. Hayes,

Interested party - Appellant,

David C. Russell,

Defendant - Appellee.

Appeal from District of Nebraska - Omaha
(8:02-cv-00553-JFB)
(8:02-cv-00561-JFB)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

August 13, 2008

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

James J. Hayes
4024 Estabrook Drive
Annandale, VA 2003

January 31, 2007

Hon. Judge Joseph F. Bataillon
United States District Court, District of Nebraska
Roman L. Hruska United States Courthouse
111 South 18th Plaza, Suite 1152
Omaha, Nebraska 68102

Re: Objection to the proposed Settlement in the *Desert Orchid Partners, L.L.C. Transaction Systems Architects. Inc.* No. 02 CV 553 (D. Neb.) class action litigation.

Dear Judge Bataillon:

I am a class member in the above captioned litigation having purchased 1.000 shares cf TSA on l2/l5/99. My basic objection is that proposed $24.5 million Settlement cannot be evaluated by class members or the court to determine whether it fairly compensates individual members for releasing defendants from claims of accounting and securities fraud. There is no attempt to show the settlement provides a significant recovery of class members damages or that a low recovery of damages is justified by a low probability the litigation will he successful.

Federal circuit courts uniformly require district courts evaluating the fairness of class action settlements to base their decisions on sound economic analysis. The Eleventh Circuit requires, for

example, that the economic analysis include a determination of 1) the likelihood of success at trial, and 2) the range of possible recovery. *Bennett v. Behring Corp.* 737 F 2d. 986 (11th Cir. 1984). However, in requesting the court to approve the adequacy of the Settlement, Class counsel assessed neither the damages nor the likelihood that class members would be able to recover their damages in a trial. Class counsel informs the class only that the "parties disagree about both liability and damages and do not agree on the average amount of damages per share that would be recoverable if Plaintiffs were to have prevailed on each claim alleged." It is hardly surprising, or relevant that the parties disagree on this crucial information. What is relevant and what class members and the court need is Class counsel's assessment of damages and the likelihood this litigation will succeed in recovering those damages.

Class counsel, however, justifies the adequacy of the Settlement solely on the basis that it provides "substantial cash benefits to Class Members" and that there is "uncertainty of being able to prove the allegations in the Complaint [and] the attendant risks of litigation." Seventeen million dollars, the net value of the Settlement, certainly provides substantial cash benefits to the class, but so would a settlement of $I00 million, $200 million, or $500 million. Which of these settlements would be adequate depends on an analysis based on the average amount of damages per share, the number of damaged shares, and the risk the litigation will not be successful. Class counsel did not provide any of the needed information, much less an analysis demonstrating the fairness of the Settlement.

Circuit Judge Richard Posner, who perhaps is the

singular authority on the Federal judiciary on economic analysis, further described the economic analysis required before district courts can approve a class action settlement as fair to class members.

> [T]he judge should have made a greater effort (he made none) to quantify the net expected value of continued litigation to the class, since a settlement for less than that value would not be adequate. Determining that value would require estimating the range of possible outcomes and ascribing a probability to each point on the range, (citing Judge Becker's opinion *In Re General Motors Corp. Pick-Up Truck Fuel Tank,* 55 3d. 768, 806 (3rd Cir. 1995) (([We] agree that 'in cases primarily seeking monetary relief, the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement.' (quoting MCL 2d at 30.44 p. 252))
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> *Reynolds v. Beneficial Nat. Bank,* 288 F. 3d. 277, 284 (7th Cir. 2002)

Class counsel acknowledges that the value of the Settlement for an individual class member depends on "when during the Class Period a Class Member purchased shares of TSA common stock, the purchase price paid, and whether those shares were held at the end of the Class Period or sold during the Class Period, and, if sold, when they were sold and the amount received." Unfortunately it is not possible to calculate the value of the proposed Settlement for individual class members or the class as a whole on a per share basis that could be

compared to the risk adjusted value of damages. Without a per share assessment of both the Settlement and the damages, it is impossible to determine whether the Settlement fairly compensates the class or individual members for releasing the defendant from accounting and securities fraud claims.

The only certain and quantifiable payment in the Settlement are attorney fees and expenses. Counsel's satisfaction with this fee is the only reason this Settlement is being represented as being fair to the class and individual members. This problem was succulently stated by Judge Posner:

> [t]he principal issue presented in these appeals is whether the district judge discharged the judicial duty to protect the members of a class in class action litigation from lawyers for the class who may, in derogation of their professional and fiduciary obligations, place their pecuniary self-interest ahead that of the class. This problem, repeatedly remarked by judges and scholars, [cites omitted] requires district judges to exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions.
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> *Reynolds v. Beneficial Nat. Bank*. 288 F. 3d. 277, 279 (7th Cir. 2002)

A recent district court decision provides additional support to reject class action settlements that lack the information needed to evaluate settlement fairness to class members. The District Court of the Southern District of Mississippi rejected a proposed settlement that lacked the information the court needed to evaluate the settlement. That case involved a minimum $50 million in payments to

settle about 35,000 damage claims arising from Hurricane Katrina. According to the opinion:

> 1. Although State Farm has made a commitment to pay at least $50,000,000 under the procedures outlined in the proposed settlement agreement, there is no way I can ascertain how this sum compares to the total claims of the members of the proposed class. Nor can I fairly estimate, with even a minimum degree of accuracy, how thinly this large sum may be spread among the class members. In these circumstances, ... I am also unable to make even a rudimentary estimate of the amount the class members are likely to receive from the sum State Farm has committed to the settlement of the class members' cases.
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> P. 6, Order On Motion For Preliminary Class Certification And For Preliminary Approval Of Proposed Class Action Settlement, *Woullard et al. v. State Farm Fire And Casualty Company,* C.A. NO.1: 06cvl057 LTS-RHW (S.D. Miss. Jan. 2007)

This court can best protect the class, by rejecting the Settlement and requiring that any future seulements provide members a certain per share payment based on a negotiated percentage of the amounts allocated under the Plan of Allocation, for example. Such a settlement could at least be evaluated by the court as it would provide certain per share payments to even class member filing a claim. Such payments could easily be compared to the amount of damages, adjusted for the risk of not prevailing in a trial. Counsel's per cent fee award would be deducted from the claims filed.

In addition, requiring securities settlements be structured on a per share basis would better align the interests of class counsel in optimizing its fee with the interests of class members in recovering their damages. No longer could class counsel negotiate a settlement that paid substantial attorney fees while providing little or no value for individual class members — who would not make the effort to prove and file a claim for a low per share settlement. The resulting low participation in the settlement would provide correspondingly low attorney fees. Per share settlements would focus settlement negotiations on damages, and the likelihood the litigation would be successful. In cases like TSA with significant damages and admitted misleading financial statements, class counsel should be effective in negotiating a settlement approximating damages.

A per share settlement proposal, while necessary for the court to evaluate fairness, will probably make settlement more difficult. The damages in this case are substantial. My damages come to $9.06 per share based on plaintiff's damage expert's Recognized Loss calculations. The overstated earnings that inflated stock prices, averaged a $1.50 per share for the years 1999 thru 2001. If anything, plaintiff's damage estimates are overly conservative, as this values the overstated earnings with an extraordinarily low P/E multiple of six. The fact that TSA stock price did not recover in the 90 days following the restatement announcement further confirms that preannouncement stock prices were inflated due to the fraudulent earnings determinations.

As an active and knowledgeable investor, TSA is one of the most egregious cases of securities fraud I

have experienced in the last 25 years. It is truly a mini Enron. Consequently, a settlement that does not provide class members a conservative estimate of damages would not be fair to the class. If the defendants believe that over statement of earnings by $1.50 per share did not damage investors purchasing their inflated stock then it is unlikely that a fair settlement can be reached. Establishing significant damages and loss causation is well worth the risk of continuing this litigation through trial and subsequent appeals.

Respectfully submitted,

James J. Hayes
Member of the TSA class

c.
Joel H. Bernstein. Esq.
Emily C. Komlossy. Esq.
David J. Goldsmith. Esq.
Joel Held. Esq.
Elizabeth L. Yingling, Esq.

Thomas Dubbs
Labaton Sucharow & RudoffLLP
100 Park Avenue. 12th Floor
New York. NY *10017-5563*

PS The procedures for objection requiring copies for all of the above counsel, when three of the counsel are with the same firms, and to list all transactions in TSA stock seemed designed to discourage objections. Every class member has the right to object and class membership is conferred on everyone who purchased stock during the class period. Thus, requiring class members to list all of

their transactions seems designed only to discourage objections from the most knowledge class members whose insight would be the most valuable to the court. It also suggests the court is predisposed to approve the settlement and is not interested in hearing any objections. However, considering the conflicts of interest that Class counsel has with the class. and the court's fiduciary duty to determine whether the Settlement is fair to the class — the Court should really be solicitous of the classs reaction to the Settlement.

James J. Hayes
4024 Estabrook Drive
Annandale, VA 22003

February 26. 2007

Via FedEx

Hon. Judge Joseph F. Bataillon
United States District Court, District of Nebraska
Roman L. Hruska United States Courthouse
111 South 18th Plaza. Suite 1152
Omaha, Nebraska 68102

Re: Reply to Plaintiffs' Memorandum of Law in Support of Motion for Final Approval of the Proposed Settlement... in *Desert Orchid Partners, L.L.C. v. Transaction Svctems Architects, Inc.* No. 02 CV 553 (D. Neb.) class action litigation.

Dear Judge Bataillon:

A review of Plaintiffs' Memorandum of Law compels a reply. The document presents inaccurate, and misleading justification for final settlement approval. Contrary to Plaintiffs' arguments, a courts final settlement approval in a class action cannot be based on a "presurnption of fairness." The Eighth Circuit interprets Rule 23(e) to require "the district court act[] as a fiduciary, serving as a guardian of the rights of absent class members." *In Re Wireless Tele. Fed. Cost Recovery Fees Lit.,* 396 F. 3d 922 (2005) (Citing: *Grunin v. Int'l Hose of Pancakes,* 513 F 2d 114, 123 (8th Cir. 1975). It is difficult to envision how this obligation can be met if a court presumes the settlement is fair simply because class counsel —

who at a minimum, has a shared interests with the defendents in having the settlement approved—claims that the settlement is a product of am's-length negotiations.

In any event, the Plaintiff's analysis of the risks in establishing loss causation reveal the falsity of this presumption. Plaintiffs; - analysis reveals that "holder" Class members have significantly better case for showing loss causation than the "in-and-out" Plaintiffs represented by Class counsel. This admission shows a conflict of interest between the holder Class members and the in-and-out Class members, and that the holder Class members are not being adequately rcpresenled by Class counsel. The inadequate representation of holder Class members discredits *any* presumtion of fairness, and precludes final approval of settlement.

Plaintiff's ad hominem attacks[1] on an individual class member simply diverts attention from the

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[1]Class counsel misleads this court that it "can consider Mr. Hayes's status as a professional gadfly in evaluating his objection." (p. 23 n. 9) Plaintiffs' argument is based on a Texas court's statement that "Federal courts are increasingly weary of professional objectors." *Shaw v. Toshiba Am. Information Sys., Inc.*, 91 F. Supp 2d 942, 973 (E.D. Texas 2000) The court that observed that: "[s]ome of the objections were obviously 'canned' objections filed by professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests, ..." It turns out that the protessional objector is a law firm and the "canned" objection follows from the objection's reference to "Sears" as the defendant. Regardless, the *Toshiba* court took all the objections seriously; "[i]t read, re-read, and duly considered all objections regardless whether they were procedurally deficient, late-filed or simply inapposite to this case." (Emphasis in opinion) That Class counsel considers an objecting class member a gladfly has no bearing on the court's duty to consider the objection on its merits.

substance of the objection that the PIaintiffs' did not quantify the risks of litigation sufficient to "quantify the net expected value of continued litigation to the class" that the Seventh Circuit requires before it approves a class action settlement. *Reynolds v. Beneficial Nat. Bank,* 288 F. 3d. 277, 284 (7th Cir. 2002) Plaintiff's discussion of the litigation risks cannot substitute for a quantitative analysis.

Notably Plaintiff's Memorandum, provides three estimates of classwide damages: $746 million, $328 million, and $146 million that were not disclosed to Class members. (p. 14) This range does not, however,

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Finally Plaititiffs' argument that the Hayes objections here should be rejected because these same objections have previously been rejected in other cases where Haves objected is based on misstated facts. First, neither The Fruit case nor the Clayton case, discussed by the Plaintiff on page 28, have been finally adjudicated. Fruit is on appeal pending a decision by the Sixth Circuit. In addition, the Fruit objection raised different issues than those in this objection. As characterized by the district court: "Mr. Hayes does not appear to object to the substance of the settlement, but instead to the timeliness of the notice and the fee request ofcounsel." *New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc.,* 234 F.R.D. 627. 632 n.2 (W.D. Ky. 2006). Clayton is currently before the U.S. Supreme Court on a petition for a writ of certiorari. The question presented in this petition includes: "[w]hether Tennessee courts denied class members their Fourteenth Amendment rights to due process and or equal protection in approving a class action settlement without making findings on the 'likelihood of success' in a trial or 'potential recovery' if the class succeeded on their breach of fiduciary claims as required by federal law in similar class action settlements." The Seventh Circuit and the Eleventh Circuit require district courts to include an evaluation of these factors in considering the fairness of a proposed settlement and these are the principal issues in the TSA objection.

represent the uncertainty in estimating damages i.e. a low-high range, as implied by Plaintiffs' analysis, but cumulative damages of what would be three subclasses, classified by the relative strength of establishing loss causation. Thus, the $146 million represents the damages incurred by the "holder subclass," members who held TSA stock on November 19, 2002 when TSA announced it would reduce its previously reported earnings for fiscal years 1999, 2000 and 2001. The other two subclasses with damages of $418 million and $182 million represent "in-and-out" Class members who purchased and sold TSA before the announcement that the company had fraudulently reported earnings. The August 14, 2002 disclosure where TSA disclosed it was reviewing its prior earnings disclosures marks the demarcation between the two in-and-out subclasses. According to the Plaintiff, the Supreme Court's 2005 decision—*Dura Pharmaceuticals, Inc V. Broudo*. 544 U.S 336, eliminated the "pure price inflation" theory of loss causation, and created significant risks that the two in-and-out subclasses could maintain their action. This ruling significantly increases the likelihood that the class would be reduced to the holder subclass and that the two "in-and-out" subclasses would recover nothing. (p. 14)

The problem brought to light by Plaintiffs' risk assessment is that the differences in relative risk between the in-and-out members and the holder members is not reflected in the allocation of the settlement fund. A risk adjusted allocation would substantially reduce the portion of the fund going to the in-and-out members and increase that going to the holder members. The failure to risk adjust the allocations is hardly surprising as the representative

Plaintiff is in the most tenuous subclass. Rather than seek to recertify the class to include three subclasses with separate representation for the holder class; counsel chose to ignore this conflict, and its weakened bargaining position to negotiate an inadequate settlement. By the time settlement negotiations began, about three and a half years after the suit was filed, class counsel had invested most of the $8.6 million in time and expenses it claims to have spent on this case. Under these circumstances, Class counsel's sole interest is not in negotiating a settlement based on the damages and the strength of the case but negotiating a settlement of sufficient size to pay its fees and expenses regardless of the strength of the case and damages of the holder class members.

Class counsel concealed its conflict with the holder class members by omitting from the settlement announcement the disclosures on class damages and risk assessment of the in-and-out and holder class members, which it provided this court in its Memorandum. Nevertheless, counsel argues that the settlement announcement satisfies the "broad 'reasonableness' standards imposed by due process." (quoting *Petrovic v. Amoco Oil Corp.*, 200 F. 3d 1140, 1153 (8th Cir. 1999) (citing *Grunin*, 513 F. 2d at 121) The TSA notice, however, does not provide class members the information "that enables class members rationally to decide whether they should intervene in the settlement proceedings or otherwise make their views known." (*Petrovic* at 1153 citing *Reynolds v. National Football League*, 584, F. 2d 280. 285 (8th Cir. 1978)) In *Petrovic*, the Eighth Circuit concluded that a settlement notice was adequate that informed class members that:

> [t]he owners of the 129 properties in 'Zone A' ...are guaranteed to receive 54% of the value of their properties. The owners of the 373 properties in 'Zone B' ...are guaranteed to receive $1,300 per property. The owners of the approximately 5,000 propeerties in 'Zone C,' ...
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> *Petrovic* at 1145.

In TSA, however the holders class members were not informed, like the Zone A subclass in *Petrovic,* that their legal position was Superior to that of the in-and-out members. Such a disclosure would be expected to cause many objections as the settlement allocation did not discount the allocation awarded to the in-and-out members.

The revelations of Class counsel's conflict with the holder members validates this class member's objection that class members were not been provided sufficient information to evaluate the proposed settlement. This problem remains; Class counsel's conflict of interest with the holder class members is the show stopper as this Court can not approve a settlement where the representative plaintiff's claims are not typical of the claims of the class or where the representative parties have not fairly and adequately protected the interests of the class as provided by Rule 23(a) and (b) of the Federal Rules. The Eighth Circuit has determined that: "[a] district court has a duty to assure that a class once certified continues to be certifiable under Fed. R. Civ. P. 23(a). [cites omitted.] A district court must reconsider a ruling certifying a class, for instance, if a subsequent development creates a conflict of interest that presents the representative party from fairly and

adequately protecting the interests of all class members. *Petrovic* at 1145.

Respectfully submitted

James J. Hayes
Holder member of the TSA class

c. Via First class mail.

Joel H. Bernstein, Esq.
Emily C. Komlossy, Esq.
David J. Goldsmith, Esq.
Joel Held, Esq,
Elizabeth L. Yingling, Esq.